United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

T-3328

74-1497

UNITED STATES DISTRICT COURT

FOR THE SECOND JUDICIAL CIRCUIT

PAUL SANVILLE,
Suing on Behalf of Himself and All Others Similarly Situated,
Plaintiff-Appellant

vs

PAUL HENNESSEY,
Individually in His Official Capacity as Superintendent of the Community Correctional Center, St. Johnsbury, Vermont, Sued on Behalf of Himself and All others Similarly Situated;
JULIUS MOEYKENS,
Individually and in His Official Capacity as Superintendent of the State Correctional Facility, Windsor, Vermont,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF OF PLAINTIFF-APPELLANT

WILLIAM M. DORSCH
Vermont Legal Aid, Inc.
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Did the District Court Err in Dismissing the Complaint Because of Mootness, Where the Complaint Alleged That a Class of Prisoners was Subject to a Deprivation of Their Right to Due Process of Law by Reason of the Appellees' Procedure for Transferring an Inmate From a Vermont Correctional Center to the Vermont State Prison?

II. Statement of the Case

In September, 1973, the appellant filed a complaint in the United States District Court for the District of Vermont, contending that the appellees herein denied him due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, when they transferred him from a state correctional center to the state prison without affording him an adequate prior hearing. The appellant alleged that on November 10, 1972, he was transferred from the Community Correctional Center at St. Johnsbury, Vermont, to the State Correctional Facility at Windsor, Vermont, without being given adequate notice, an opportunity to hear the case against him and present a case in his defense, or any other procedural safeguards. Subsequent to the original filing, the appellant was returned to the correctional center, and then on or about April 25, 1973, was once again transferred to the state prison with an adequate hearing.

The appellant amended his complaint to include the additional illegal transfer and to request designation as a class

action. The appellees moved that the trial court dismiss the action or, in the alternative, grant summary judgment to the appellees.

The trial court held a hearing on the appellees' Motions For Summary Judgment and To Dismiss. The court dismissed the case as moot on the basis that the appellant Sanville had been released and was on parole at the time of the hearing.

The appellant contends that the trial court erred in dismissing the case without granting class action status and determining the substantive issues raised by the appellant.

III. The Appellant's Action should Be Decided by the Court Regardless of the Mootness of the Appellant's Claim

A. The Trial Court Committed Reversible Error When It Dismissed the Appellant's Class Action as Moot

1. The Trial Court Improperly Failed to Act on the Appellant's Motion for Class Action Status.

The appellant filed a pro se action on or about August 14, 1973. On October 25, 1973, the appellant, through his assigned counsel, Vermont Legal Aid, Inc., amended his complaint. Pursuant to F.R. Civ. P. 15(a), the appellant's amended complaint supplemented his original complaint without leave of the trial court. In his amended complaint, the appellant moved that the court declare this matter a class action.

The trial court noted the appellant's request for class action status, Appendix, pg. 15. However, the court did not act

on the appellant's request. Supra, pp. 15-17. In failing to act on the class action question, the court acted contrary to clearly established law. The appellant contends that the trial court should have declared this matter a class action and that a change in the appellant's status does not moot the case.

The Federal Rules specify the procedures to be followed subsequent to a request for class action status.

> As soon as practicable after commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. F.R. Civ. P 23(c). (emphasis added)

This rule clearly requires that the trial court act on a request for class action status. Jackson v. Cutter Laboratories 338 F. Supp. 882, 886 (E.D. Tenn. 1970). A court cannot ignore a request for class action status as the trial court did in this case. Courtshave stated that F.R. Civ. P. 23(c) requires the trial court to determine the class action question even absent a proper motion by the plaintiff. Weisman v. M.C.A., Inc., 45 F.R. D. 258 (D. Del. 1968); Herbst v. Able, 45 F.R.D. 451 (S.D. N.Y., 1968). In Weisman, the party seeking class status properly moved for such determination. However, in a footnote, the court stated that it did

> ...not suggest that this determination under Rule 23(c)(1) need be made only on motion of the parties. On the contrary, the Rule indicates that the court has an obligation to proceed under 23(c)(1) even in the absence of a proper motion. Supra at 260.

The appellant properly requested class action status under the Local Rules in effect in the District Court of Vermont at the time the trial court heard and determined this case.

The trial court erred in not disposing of the class action question.[1]

2. The Appellant's Action Should be Declared a Class Action.

(a) The Action herein Complies with the Prerequisites of Rule 23a.

In his complaint, the appellant requests that the court declare this case a class action pursuant to F.R.Civ. P.23. F.R.Civ. P. 23(a) states four prerequisites for class action status:

> ...(1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. F.R.Civ. P. 23(a).

The appellant contends that this case satisfies all four prerequisites and that class action status best enables the Court to determine the case.

(1) The Class is so Numerous That Joinder of All Members is impractical.

At the time the appellant filed this action there were well over one hundred inmates housed at the various Vermont Correctional Centers. All of these inmates are members of the class because they are subject to a transfer to the State Prison without an adequate prior hearing. As the Circuit Court of Appeals explained in Holeman v. Packard Instrument Co.399 F2d 711,715(7thCir.1969)

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[1] The District Court for Vermont promulgated Local Rule 11 specifying class actions procedures on January 14, 1974.

> "(r)ule 23 should be construed to permit a class action where... persons . . . act to the injury of many persons so numerous that their voluntarily, unanimously joining in a suit is concededly improbable and impracticable."

In this case, the class may be easily defined as those inmates housed at the various Vermont Correctional Centers. The large inmate population, which is subject to frequent change, makes intervention by all the inmates impracticable.

(2) There are Questions of Law or Fact Common to the Class.

The appellant alleges in his complaint that the appellees transferred him from the St. Johnsbury Correctional Center to the Vermont State Prison without an adequate prior hearing. There are no issues in this case which cannot be decided on a common basis. All members of the class have in common the substantial issue of law, that is, whether the transfer procedures from a Vermont Correctional Center to the Vermont State Prison violates due process of law as guaranteed by the United States Consititution.

The appellant seeks injunctive relief to provide adequate hearings prior to transfer. Since the appellant contests the treatment of the prison population, the same facts pertain to all members of the class.

(3) The Claims of the Representative Party is Typical of the Claims of the Class.

The claims of the representative party are identical with the claims of the other members of the class. Generally, the courts have held that the requirement is satisfied even though varying fact patterns support the claims of individual class members or there is a disparity in the damages claimed by the

named parties and the other members of the class. Rodrizuez v. Swank, 318 F.Supp. 28 D.C. Ill, 1970, and affirmed without opinion 403 U.S. 901 (1971); Randle v. Swank, 53 F.R.D. 577 (D.C. Ill., 1971)

(4) The Representative Will Fairly and Adequately Represent the Interests of the Class.

The appellant contends that he will fairly and adequately represent the interests of the class. Courts, in considering the adequacy of representation, have considered:

1) whether the interests of the named plaintiff are coextensive with the interests of the other class members;

2) whether the interests of the plaintiff are antagonistic to those of any other class member; and

3) the proportion that the named plaintiffs bear to the entire class. See 3B Moore, Federal Practices 23.07 (1). That is, some members of the class should not have greater or more extensive rights than other members of the class, and the interests of some members of the class must not be different from or in conflict with the rights of the other members.

By definition, each member of the class resides at a Vermont Correctional Center and is subject to transfers to the Vermont State Prison under the present transfer procedures. Though each member of the class may suffer to a varying degree, the issue here is not only the amount of damage done to each member of the class, but the very rights of the class enfringed by an illegal transfer. All members of the class have the identical interest of having their rights clarified by the court. No member of the class will have his rights, his "interest", clarified to a greater or lesser degree.

No interests of one member of the class can be antagonistic to the other members of this class as this action only seeks to enlarge the due process protections afforded each class member. The use of due process protections will be at the discretion of each member of the class; any future class member may choose not to avail himself of these safeguards. As the court in Snyder v. Board of Trustees of the University of Illinois, 286 F.Supp. 927 (N.D. Ill. 1968), stated when granting class certification where the relief sought was a clarification of class rights:

> Resolution of this issue will, as a practical matter, be dispositive of the rights of all members of the class, whether or not they approve of the suit. (p. 931).

A third consideration in determining the adequacy of representation has been the proportion that the named plaintiffs bear to the entire class. The appellant contends that this consideration is not relevant to this case because he seeks declaratory and injunctive relief or a clarification of the rights of the class. The appellant feels that this concern has arisen mainly from the problem of assessing individual damages and is not of consequence in this action where damages would not lie.

b. Notice to Class Members

The United States Supreme Court affirmed this Court's holding laying out stringent notice requirements in certain class actions. Eisen v. Carlisle and Jacquelin, ___U.S.___, 42 U.S. L.W. 4804 (1974), affirming 479 F2d. 1005 (2d Cir. 1973). The appellant contends that the Eisen case does not require notice to all class members in this action. Eisen was a 23(b)(3) suit, involving far different problems to potential class members than this action, a 23(b)(2) suit.

Eisen was cited as controlling in Pasquiet v. Tarr, 318 F. Supp. 1350, Schnader v. Selective Service System Local Board No. 76 of Wisconsin, 470 F.2d 73 (7th Cir., 1972); and Seilstra v. Tarr, 466 F.2d 111 (1972). These cases refused to give res judicata effect to Gregory v. Hershey, 311 F. Supp. 1 (E.D. Mich. 1969) in which the Court held that no notice was required under a 23(d)(2) action challenging certain procedures of the Selective Service; and in fact no notice was given. The courts held that due process would preclude the application of Res judicata to bind an unlisted member of the class to an adverse decision. See also Clarico v. American Marine Corporation, 297 F.Supp. 1305 (E.D. La., 1969).

These courts followed the Eisen reasoning that due process safeguards required notice in 23(b)(2) suits. Other courts have held that it is not notice which is essential to due process but the adequacy of representation of their interests by the named parties. See Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kansas, 1968) (citing Dolgow v. Anderson, 43 F.R.D. 472); this position is cited with approval in 3B Moore, Federal Practice, Sect. 23.72 pp. 1421-1422 (1969). The courts in Lynch v. Household Finance Corporation, 318 F.Supp. 111 (1973) (Footnote 3) Francis v. Davidson, 340 F.Supp. 351 (D.M.D., 1972), Woodward v. Rogers, 344 F. Supp. 974 (D.D.C., 1972) (Footnote 10) all cited adequacy of the representation of the class as an important factor in their decisions not to require notice in 23(b)(2) cases. As outlined above, the appellant contends that he adequately represents the entire class, and it is this adequacy of representation which fulfills the underlying due process protections of notice in a 23(b)(2) action.

As the authors point out in Supplement to Volume 3B Moore, Federal Practice § 23.72, the problem is not notice, but whether the class action involves a right as to which it is appropriate to permit adjudication by representation. The due process rights involved here are eminently suited to a class action; this is precisely the kind of action contemplated under 23(b)(2). No unrepresented plaintiff could be prejudiced by an adjudication of the substantive issues in this case where the action seeks to clarify the procedures the appellees must follow in relation to the class. The action should be a class action to insure that the court's order goes beyond the named plaintiff.

Assuming, however, that notice is required under 23(b)(2), the appellant contends that such notice can be easily effected. The court has wide discretion to order notice. The appellant contends that adequate notice can be attained by notifying all inmates of the Vermont Correctional Centers of the pendency of this action and their right to withdraw as class members.

The appellant contends that this court should declare this class action for the reasons cited above. Such a declaration would be in the best interests of proper adjudication of the issues raised in this action.

IV. A Class Action Does Not Become Moot As a Result of the Status of the Representative Plaintiff

The trial court dismissed this action because the appellant, Sanville, has been released on parole. However, Sanville acts

as the representative plaintiff for a class. The status of the representative plaintiff, who was a proper member of the class at the time the action was filed, does not affect the controversy raised in a class action.

Many times incidents which give rise to controversy are resolved prior to trial. However, if the class members are still threatened by repeated, similar incidents the underlying problems remain. In such instances, the court should not dismiss the action merely because the representative plaintiff's dispute has become moot. Roe v. Wade,410 U.S. 113, 35 L.Ed 2d 147, 93 S.Ct. 705 (1973); Crow et al. v. California Department of Human Resources, et al, 325 F. Supp. 1314, 1316 (N.D.Ca., 1970).

> It is well settled that the mooting of the named representative's claim does not render the whole suit moot. Thomas v. Clarke, 54 F.R.D. 245, 252 (D.Minn. 1971). Jenkins v. United Gas. 400 F2d 28 (5 Cir., 1968), Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F2d 648 (14th Cir. 1967); Gatling v. Butler, 52 F.R.D. 389, 392 (D. Conn. 1971); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), aff'd 400 U.S. 884, 37 L.Ed.2d 129, 91 S. Ct. 139; Gaddis v. Wyman,304 F.Supp. 713 (S.D.N.Y., 1969); Kelly v. Wyman,294 F. Supp. 887 (S.D. N.Y., 1968).

In Jenkins v. United Gas,supra, the representative plaintiff, a black, contended that the defendant discriminated against him in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. A. 2000 et seq. Subsequent to filing his action, the plaintiff received an offer for and accepted a promotion. The Fifth Circuit held that the action was not mooted merely because the defendant satisfied the representative

plaintiff's complaint. The court made its holding even though the representative plaintiff voluntarily removed himself from class membership.

The Fifth Circuit has affirmed its holding in Jenkins in a housing eviction case. Quevado et al. v. Collins et al., 414 F.2d 797 (5th Cir. 1969). In that case, Dominga Quevado claimed that she had been evicted without being afforded due process of law. Prior to the trial, Quevado, the representative plaintiff moved from the defendant Housing Authority. The court stated that it did not have a sufficient record to to determine if the case should be maintained as a class action but that, in any event, the plaintiff's move would affect neither the question of class action status or the viability of the action should it be declared a class action.

The most extreme example of a class representative's action becoming moot occured in Wymelenberg v. Syman,54 F.R.D. 198 (E.D. Wisc., 1972). The plaintiff sought a judgment declaring Wisconsin's two year residency requirement for the filing of a divorce unconstitutional. Subsequent to filing the action but prior to final hearing, Wymelenberg's wife died, thereby resolving all marital problems and nullifying any reason for divorce. The court allowed Wymelenberg to proceed even though he no longer belonged to the class still affected by the statute under attack.

The Federal Rules concerning class actions raise a further barrier to dismissal of class actions because the representative plaintiff's controversy has been resolved.

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. F.R. Civ. P. 23(e).

Any dismissal of a class action because of mootness of the representative plaintiff's claim would be a dismissal that injures the other members of the class, contrary to the above-cited rule. Gaddis v. Wyman, supra. F.R. Civ. P. 23(e) precludes dismissal of a class action for mootness of the representative plaintiff's claim even if the court has not acted on the plaintiff's request for class status.

> ...whatever uncertainties exist as the precise status of an action brought as a class action, during the interim between filing and the 23(c)(1) determination by the court, it must be assumed to be a class action for purposes of dismissal or compromise under 23(e) unless and until a contrary determination is made under 23(c)(1). Philadelphia Electric Company v. Anaconda American Brass Company, 42 F.R.D. 324, 326 (E.D. Pa., 1967); Gaddis v. Wyman, supra. See also C. Wright, Class Actions, 47 F.R.D. 169, 182 (1969).

The appellant was released on parole subsequent to filing this case but prior to hearing. The appellant did not voluntarily change his status; he does not decide parole questions. The appellant properly filed a class action and, as argued above, was entitled to class action status.

As discussed above, the trial court should not have dismissed this action as moot prior to determining the class action question.

B. The Trial Court Erred In Dismissing This Action Because the Appellant's Claim Raises Substantial Questions Which Will Repeatedly Come Before This Court Until They Are Resolved.

The appellant contends that he has raised substantial questions in this action which should be answered by the court. The appellant contends that this court should answer these issues even if the court determines that this action should not be maintained as a class action.

The United States Supreme Court has repeatedly held that courts must deal with certain issues which become moot for the particular plaintiff prior to a final hearing. Roe v. Wade, supra. In Roe, the court found that

> pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." Roe v. Wade, supra at 125.

The Court has found exceptions to the usual rule in other situations such as an action charging the defendant with violations of the Clayton Act where the complained of practice has ceased at least for the time, United States v. W. T. Grant Co., 345 U.S. 629, 97 L.Ed. 1303, 73 S.Ct. 894; an action by the Interstate Commerce Commission to enforce an order enjoining a carrier from granting a shipper undue preference over his creditors when the order was by its express terms expired, Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 55 L.Ed. 310, 31 S. Ct. 279 (1911); an action contesting election procedures in an election that had already been held, Moore v. Ogilvie, 394 U.S. 814, 23 L.Ed. 2d 1, 89 S.Ct. 1493 (1969).

The appellant contends that the question of intrastate prison transfer without an adequate prior hearing falls within the Supreme Court guidelines discussed above. At present, a prisoner has minimal control over his location while in the custody of the Commissioner of Corrections. At some time during the protracted litigation involved in a case, such as the one presently under consideration, the prisoner can be granted parole. In fact, the lower court held that the appellant's parole has mooted this case.

The lower court's ruling ignores the Supreme Court holdings discussed above. The appellant has raised substantial issues which will repeatedly come before the court, frequently by prisoners who are no longer directly aggrieved by the action complained of. The court should resolve the issue by deciding this matter on the substantive questions the appellant has raised.

VI. By Their Action, The Appellees Have Violated The Appellant's Right To Due Process Of Law As Guaranteed By The Fourteenth Amendment To the United States Constitution

A. An Inmate Has a Right to An Adequate Hearing Prior to Transfer From a Lesser to Greater Security Facility

The appellant contends that the appellees violated his rights to due process of law, guaranteed by the United States Constitution, when they transferred him from a correctional center to the state prison without an adequate prior hearing.

This court has recently decided a case directly on point with this case. Newkirk v. Butler, U. S. Court of Appeals, 2nd Circuit, Docket No. 73-2858, June 3, 1974.

In Newkirk supra, Judge Mansfield affirmed with modification the District Court's ruling that a prisoner, transferred from a lesser to a greater security facility, suffers a substantial loss, and therefore is entitled to due process safeguards. The Court held that the elements in a transfer which indicate the need for due process protection do not include the Department of Corrections classification (e.g., as "administrative" or "disciplinary") or the accidents of geography (inter-, as opposed to intrastate), but rather the practical consequences of the transfer of the prisoner and the very real possibility that the transfer is based on false information or presumptions.

> These factors, the adverse consequences to the prisoner and the chance of error, are the principal elements to be considered in determining what process is due the transferred prisoner, rather than the label put on the transfer. Where the prisoner suffers substantial loss as a result of the transfer he is entitled to the basic elements of rudimentary due process, i.e., notice and an opportunity to be heard. Newkirk v. Butler, supra at 8. (emphasis added).

Newkirk's transfer resulted in a substantial loss of personal freedom and access to rehabilitative programs. Given the context of prison life, any transfer to a higher security setting, such as suffered by the appellant in this case, is likely to result in the same substantial loss of advantage, regardless of whether the prisoner is transferred

out of state, Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973); within the state, White v. Gillman,et al., 360 F. Supp. 64, S.D. Iowa, 1973); or even within the same prison, Wolff v. McDonnell,_____ U.S. _____, 42 U.S. L.W. 5190 (1974).

The appellant, in being transferred from a correctional center to the state prison, suffered the same order of loss as Newkirk. When he was sent to the state prison at Windsor, Sanville lost the more flexible rehabilitative programs at the correctional center and the opportunity to earn periodic furloughs from incarceration as well as being subjected to the harsher discipline and loss desirable inmate population at Windsor. As Newkirk, Sanville was entitled to an adequate hearing prior to his transfer.

B. The Appellant Did Not Receive An Adequate Hearing Prior To Being Transferred From A Correctional Facility To The State Prison.

The requirements for a meaningful hearing prior to transfer have been set out by the several courts which have granted such hearings.

> The inmate must be given timely notice of the pendency of transfer proceedings and the nature of the charge or reasons for the transfer. Within a reasonable period of time he must be given a hearing before whatever tribunal or individual makes the initial or possibly final decision as to whether he will be transferred. Such a tribunal or individual must be impartial, that is, the initiating or investigative officer may not also bear responsibility for the ultimate decision reached. Some participation by the investigating officer in the proceedings will not necessarily taint the result, however. What is

> essential is that the fairness and objectivity of the decision-making body remain unimpaired. At the hearing an inmate must be given a fair and meaningful chance to explain his side of the story, to question the accusing witnesses, and to present defenses or mitigating circumstances or other reasons why he should not be transferred.... The inmate must also be given a reasonable chance to present witnesses on his behalf where fairness demands. The decision-maker need not follow judicial rules of evidence or prepare a transcript, but a basic record of the substance of the proceedings, the disposition reached, and the reasons therefore should be made. White v. Gillman, supra.

The Newkirk court issued similar requirements for hearings prior to transfer.

By the facts stated in their own affidavits, the appellees fail to satisfy the minimal requirements of a meaningful hearing. The appellant was called to the defendant Hennessey's office and informed of his impending transfer and the reasons therefor. The prisoner was afforded no opportunity to consult counsel, prepare a case, present evidence, or be confronted by accusing witnesses. The appellee Hennessey acted as both initiating officer and final arbiter. Such a procedure fails to satisfy the guidelines laid down by this and other courts for hearings prior to intrastate prison transfers.

C. The Appellant Should Be Given an Opportunity to Prove His Claim Against the Appellees

Although the Newkirk decision offers strong guidance to the court in the case at hand, it does not dispose of the several issues presented herein. First, the appellant now before the court was not party to the Newkirk action, and the

relief granted to Newkirk does not automatically extend to Sanville, et alia. Second, the appellant has not proven that the consequences of his transfer constitute a substantial loss of whatever freedom, opportunity, and dignity he enjoyed at the medium-security facility. It remains to be determined whether he and other class members were afforded hearings prior to their transfers. It remains to be determined whether such hearings (if any) were consistent with due process standards. In short, the appellant has never had the opportunity to prove that his constitutional rights have been violated by the appellees.

VII. Conclusion

As discussed above, the lower court improperly dismissed this action. This court should declare this matter a class action and remand the case for hearing on the merits.

Submitted by:

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

PAUL SANVILLE, Suing on behalf of himself and all others similarly situated, Plaintiff-Appellant	)	
vs.	)	DOCKET NO. T-3328
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CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) copies of the foregoing BRIEF OF PLAINTIFF-APPELLANT and two (2) copies of APPENDIX OF PLAINTIFF-APPELLANT upon Alan W. Cook, Esquire, Assistant Attorney General, by mailing same to him by first class mail, postage prepaid, to his office at the Department of Corrections, Montpelier, Vermont 05602, on this 18th day of July, 1974.

S. W. Kimbell

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